JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Wed Aug 27 17:07:23 2014

Betsan Sdn Bhd v Norhaidi Che Dan @ Che Din & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1542 OF 2011
CLEMENT SKINNER, AZIAH ALI AND MOHTARUDIN BAKI JJCA
15 NOVEMBER 2013

Contract — Terms — Condition — Conditions precedent — Whether party's reciprocal obligation to contribute to working capital only arose upon fulfillment of conditions precedent by other party — Whether failure to fulfill conditions precedent entitled innocent party to terminate contract and obtain refund of monies paid

The appellant entered into an agreement ('the SSA') to buy the first respondent's 67% shareholding in the second respondent ('R2') in reliance upon the first respondent's representations that (a) R2 beneficially owned not less than 30% equity in a consortium known as Lingkaran Luar Butterworth (Penang) Sdn Bhd ('LLBPSB') which had been awarded a concession agreement by the federal government to construct, maintain and operate the Butterworth Outer Ring Road Project ('the BORR project') and (b) R2 was or would be the beneficial owner of not less than 30% equity in another consortium Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') which had been awarded a concession agreement by the Penang State Government to carry out land reclamation works for the BORR project. Both the representations were set out within the SSA. The shares sale was subject to various conditions precedent ('CPs') which the first respondent had to fulfill within a prescribed time ('the cut-off date') failing which the appellant had the right to terminate the SSA and obtain the refund of all monies it had paid to the first respondent. Despite several extensions to the cut-off date, the CPs remained unfulfilled. The appellant then signed a supplemental agreement ('the SSSA') with the first respondent to buy 25% of his shares in R2 for RM3.9m. The SSSA provided that it was to be read together with the SSA as one document and that the provisions of the SSA remained valid, effective and enforceable. Due to the first respondent's continued failure to fulfill the CPs under the SSA and on discovery of the fact that R2 did not have a shareholding or any rights or interests in either LLBPSB or RCBSB even after five years of the signing of the SSSA, the appellant terminated both agreements and demanded the refund of the RM3.9m. On the first respondent's failure to refund the money, the appellant sued for its recovery and for a declaration that it had validly terminated the agreements. The High Court dismissed the suit on the ground the first respondent's failure to fulfill the CPs could not be a reason for terminating the agreements. The court held that the condition for fulfillment of the CPs under the SSSA with regard to the purchase of the 25%

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Wed Aug 27 17:07:23 2014

shareholding had been waived. In the instant appeal against the High Court's decision, it was argued that the first respondent's representations/warranties were true at the time they were made and that R2's inability to maintain a 30% equity in the two consortiums was because the appellant failed to contribute to R2's working capital including the call for an increase in the capital of the concession companies. The respondents contended that the appellant's obligation to make the contributions was triggered when it purchased the 25% shareholding in R2.

Held, allowing the appeal:

(1) The evidence showed there was a clear breach of the SSA by the first respondent entitling the appellant to exercise its contractual right to terminate both the SSA and the SSSA and obtain the refund of the RM3.9m it had paid to the first respondent (see para 15).

(2) Fulfillment of the CPs had been waived only in respect of the sale of the 25% shareholding. Clause 4.1 of the SSSA clearly stipulated that the balance 42% shares would be transferred to the appellant only upon fulfillment of the CPs as stated in article III of the SSA. There was no inconsistency between the SSA and the SSSA (see para 13).

(3) The appellant's reciprocal obligation (to contribute to the capital requirements) was not triggered with the completion of the sale of the 25% shares. Clause 10.01 clearly stated that the parties' reciprocal obligations only arose from the date the SSA became unconditional, which event only occurred upon fulfillment, or waiver of fulfillment, of all the CPs. Since the CPs had not been fulfilled, nor had their fulfillment been waived, in respect of the sale of the remaining 42% of R2's shares, the purchase of the remaining 42% shares could not be completed. The effect was that the appellant had yet to own 67% of the first respondent's shareholding in R2 as contemplated under the SSA. The High Court therefore erred in finding the appellant had breached cl 10.01 as its reciprocal obligation under that clause had not been triggered (see para 14).

[Bahasa Malaysia summary

Perayu memasuki perjanjian ('SSA') untuk membeli 67% pegangan saham responden pertama dalam responden kedua ('R2') bergantung atas representasi responden pertama bahawa (a) R2 memiliki secara benefisiari tidak kurang daripada 30% ekuiti dalam konsortium yang dikenali sebagai Lingkaran Luar Butterworth ('LLBPSB') yang telah diawardkan perjanjian konsesi oleh kerajaan persekutuan untuk membina, menyelenggara dan mengoperasi Projek Jalan Lingkaran Luar Butterworth ('projek') dan (b) R2 adalah atau akan menjadi pemilik benefisiari tidak kurang daripada 30% equiti di dalam konsortium lain Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') yang

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Wed Aug 27 17:07:23 2014

telah diawardkan perjanjian konsesi oleh Kerajaan Negeri Pulau Pinang untuk menjalankan kerja-kerja tebus guna untuk projek tersebut. Kedua-dua representasi ditetapkan di dalam SSA. Jualan saham adalah tertakluk kepada pelbagai syarat-syarat duluan ('SD') yang mana mesti dipenuhi oleh responden pertama dalam masa yang ditetapkan ('the cut-off date') jika gagal perayu mempunyai hak untuk menamatkan SSA tersebut dan mendapatkan kembali bayaran balik kesemua wang yang dibayar kepada responden pertama. Walaupun terdapat beberapa lanjutan kepada tarikh akhir, SD masih tidak dipenuhi. Perayu kemudiannya menandatangani perjanjian tambahan ('SSSA') dengan responden pertama untuk membeli 25% daripada sahamnya di dalam R2 untuk sejumlah RM3.9 juta. SSSA memperuntukkan bahawa ia patut dibaca bersama dengan SSA sebagai satu dokumen dan bahawa peruntukan SSA kekal sah, efektif dan berkuat kuasa. Akibat kepada kegagalan berlanjutan responden pertama untuk memenuhi SD di bawah SSA dan atas penemuan fakta bahawa R2 tidak mempunyai pegangan saham atau apa-apa hak atau kepentingan di dalam sama ada LLBPSB atau RCBSB walaupun selepas lima tahun menandatangani SSSA tersebut, perayu menamatkan kedua-dua perjanjian dan menuntut bayaran balik sebanyak RM3.9 juta. Atas kegagalan responden untuk membayar balik wang, perayu menyaman untuk mendapatkannya semula dan untuk perisytiharan bahawa ia telah menamatkan perjanjian secara sah. Mahkamah Tinggi menolak tindakan tersebut atas alasan kegagalan responden pertama untuk memenuhi SD tidak boleh menjadi sebab untuk menamatkan perjanjian tersebut. Mahkamah memutuskan bahawa syarat untuk menyempurnakan SD di bawah SSSA berkaitan pembelian 25% pegangan saham telah diketepikan. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, ia dihujahkan bahawa representasi/waranti responden pertama adalah benar pada masa ia dibuat dan bahawa ketidakupayaan R2 untuk mengekalkan 30% equiti dalam kedua-dua konsortium adalah kerana perayu gagal untuk menyumbang kepada modal kerja R2 termasuk panggilan untuk menambahkan modal di dalam syarikat konsesi. Responden-responden berhujah bahawa tanggungjawab perayu untuk membuat sumbangan dicetuskan apabila ia membeli 25% pegangan saham dalam R2.

Diputuskan, membenarkan rayuan:

(1) Keterangan menunjukkan terdapat kemungkiran jelas terhadap SSA oleh responden pertama dengan memberikan hak kepada perayu untuk menjalankan hak kontraknya untuk menamatkan kedua-dua SSA dan SSSA dan mendapatkan bayaran balik sebanyak RM3.9 juta yang dibayarnya kepada responden pertama (lihat perenggan 15).

(2) Penyempurnaan SD yang diketepikan hanya berkaitan jualan 25% pegangan saham. Klausa 4.1 SSSA jelas menetapkan bahawa baki 42% saham akan dipindahkan kepada perayu hanya selepas penyempurnaaan SD seperti yang dinyatakan di dalam artikel SSA. Tidak terdapat

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Wed Aug 27 17:07:23 2014

ketidakselarasan antara SSA dan SSSA (lihat perenggan 13).

(3) Tanggungjawab bersaling perayu (untuk menyumbang kepada keperluan modal) tidak dibangkitkan dengan penyelesaian jualan saham sebanyak 25% tersebut. Klausa 10.01 jelas menyatakan bahawa tanggungjawab bersaling pihak-pihak hanya berbangkit dari tarikh SSA menjadi tidak bersyarat, kejadian yang mana berlaku selepas penyempurnaan, atau penepian penyempurnaan, kesemua SD. Memandangkan kesemua SD tidak disempurnakan, atau pun penyempurnaan mereka telah diketepikan, berkaitan jualan 42% baki saham-saham R2, pembelian 42% baki saham-saham tidak dapat diselesaikan. Kesannya adalah bahawa perayu belum memiliki 67% daripada pegangan saham responden pertama dalam R2 seperti yang dipertimbangkan di bawah SSA. Mahkamah Tinggi oleh itu tersilap dalam dapatan bahawa perayu telah memungkiri klausa 10.01 memandangkan tanggungjawab bersalingnya di bawah klausa tersebut tidak dibangkitkan (lihat perenggan 14).]

Notes

For cases on condition, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6572–6579.

Appeal from: Suit No D2–22–412 of 2008 (High Court, Kuala Lumpur)

Saranjit Singh (Nur Faezah Ma'sod with him) (Saranjit Singh) for the appellant.
Alan Wong Teck Wei (Andrew Heng Yeng Hoe with him) (Zain Megat & Murad) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant and the respondents had entered into two shares sale agreements whereby the appellant as purchaser, in reliance on the representations made by the first respondent, had agreed to purchase 67% of the first respondent's shares in the second respondent company. The first respondent held 24,999 out of the 25,000 issued shares of the second respondent company.

[2] The appellant alleged that the first respondent had failed to fulfill various conditions precedent which entitled the appellant to exercise its contractual right to terminate the said agreements. On 25 January 2008 the appellant terminated the agreements. By way of the High Court suit the appellant sought for, inter alia, a declaration that the two agreements stand terminated and for the refund of monies paid to the first respondent. The learned judicial commissioner (as Her Ladyship then was) dismissed the appellant's suit. Hence this appeal. We heard the appeal and by a unanimous decision we allowed the

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Wed Aug 27 17:07:23 2014

appeal and set aside the order of the High Court. We awarded costs of RM40,000 here and below and the deposit was ordered to be refunded.

SALIENT FACTS

[3] The appellant states that the first respondent had represented to the appellant that the second respondent company was the beneficial owner of not less than 30% equity and Rayston Sdn Bhd owned 70% equity in a consortium known as Lingkaran Luar Butterworth (Penang) Sdn Bhd ('LLBPSB') which had been awarded a concession agreement with the Federal Government for the privatisation of the construction, maintenance and operation of the Butterworth Outer Ring Road project including the construction of the Prai bridge ('the BORR project'). It was also represented that the second respondent company was or would be the beneficial owner of not less than 30% equity in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') which had been awarded a concession agreement with the Penang State Government in respect of land reclamation works required for the BORR project. These representations are found in cll 1.03 and 1.04 of the share sale agreement dated 1 September 1999 ('the SSA'). Clauses 1.05 and 2.01 of the SSA provides that in reliance of the first respondent's representations and undertakings the appellant agreed to purchase 16,750 ordinary shares representing 67% of the total issued share capital of the second respondent company at the price of RM 10,400,000 ('the purchase price'). The purpose of the shares sale was to enable the appellant to participate in the BORR project.

[4] The shares sale was subject to various conditions precedent ('CPs') as expressed in cl 3.01 of the SSA which the first respondent had to fulfill within the time prescribed under cl 3.02 ('the cut-off date'). Clause 3.02 (b) provides that failure by the first respondent to fulfill any of the CPs by the cut-off date entitles the appellant to terminate the SSA by giving seven days' notice and the first respondent was to refund all sums paid by the appellant.

[5] Despite several extensions given the first respondent failed to fulfill the various CPs. Notwithstanding that, the appellant and the first respondent agreed to enter into a supplemental share sale agreement dated 29 April 2002 ('the SSSA') for the sale of 6,250 shares representing 25% of the issued paid up capital of the second respondent for the total sum of RM3,880,597.01. Payment was made and the 6,250 shares were transferred to the appellant ('the transferred block').

[6] Clause 6.1 of the SSSA provides, inter alia, that the SSSA and the SSA are to be read as one. Clause 6.2 provides that save and except for the amendments and additional provisions expressly stated in the SSSA, the provisions of the SSA shall remain valid, effective and enforceable. The

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Wed Aug 27 17:07:23 2014

amendments and the additional provisions contained in the SSSA are to be read and construed as if they had been incorporated in and formed part of the SSA.

[7] As at 2007 the second respondent was not/never a shareholder nor had any rights or interests in the shares of LLBPSB or RCBSB. On 25 January 2008 the appellant terminated the two agreements due to the first respondent's failure to fulfill the various CPs stated in the SSA and its failure to remedy the said breaches despite notices issued. As a result of the termination the appellant demanded for the refund of the sum of RM3,880,597.01 which the appellant had paid under the SSSA. The first respondent failed to refund the said sum and the appellant filed a suit in the High Court seeking for:

(a) a declaration that the SSA and the SSSA stand terminated;

(b) the refund of the sum of RM3,880,597.01 with interests at the rate of 10%pa from 29 April 2002 until full and final repayment;

(c) damages to be assessed';

(d) costs; and

(e) further or other relief.

As against the second respondent the appellant sought for such further or consequential orders or directions for the cancellation of the transfer of the transferred block and for the rectification of the second respondent's register of shareholders.

[8] The learned judicial commissioner found that fulfillment of the CPs had been waived in respect of the sale of the 25% shares. However the learned judicial commissioner found that the failure to fulfill the CPs could not be a ground for terminating the agreements. Consequently the learned judicial commissioner refused the reliefs sought and dismissed the appellant's suit.

THE APPEAL

[9] Before us learned counsel for the appellant Mr Saranjit Singh submitted that the representations made by the first respondent formed the substratum of the SSA and the appellant had agreed to purchase the 16,750 shares in reliance of the first respondent's representations and undertakings. It was an admitted and undisputed fact that the purchase of the second respondent's shares was always subject to the second respondent's continued and subsisting rights and interests in the two concessions. However from 1999 till 2002 the CPs were not fulfilled and the parties then entered into the SSSA for the sale and purchase of 25% of the second respondent's shares. It was submitted that notwithstanding the SSSA, cl 6 of the SSSA provides that the representations and warranties as expressed in the SSA continued to bind the first respondent.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Wed Aug 27 17:07:23 2014

[10] Learned counsel submits that the learned judicial commissioner is correct in finding that under cl 4.1 of the SSSA the fulfillment of the CPs was waived only in respect of the sale of the 25% shares but not to the sale of the remaining 10,500 shares representing 42% of the second respondent's issued share capital. However the learned judicial commissioner had failed to consider that the first respondent had failed to fulfill his undertaking in respect of the remaining shares. On the issue of the appellant's reciprocal obligation under cl 10.01 of the SSA, learned counsel submits that the learned judicial commissioner had misconstrued the said clause because the appellant's reciprocal obligation to contribute to the capital requirements only arose upon the appellant becoming the majority shareholder in the second respondent company and this would only happen upon the completion of the purchase of 67% of the second respondent's shares. Such completion can only occur when the first respondent had fulfilled all the CPs. Since it was not disputed that the first respondent had failed to fulfill the CPs, therefore the appellant's reciprocal obligation did not arise.

[11] It was further submitted that the first respondent had failed to take any step to ensure and maintain that the representations made under the SSA continue to remain true. Although the first respondent had initiated two suits to claim the 30% interest in LLBPSB and RCBSB, one suit was dismissed without any instructions given to appeal and the other was withdrawn on the first respondent's instructions. It was submitted that the failure of the first respondent to appeal against the dismissal of one suit and his failure to continue to prosecute the other suit was a breach of his covenant under cl 3.04 that he would take all steps and do all things necessary to fulfill the CPs. Thus it was abundantly clear that the first respondent had breached his representations under the SSA which entitles the appellant to terminate the two agreements and claim the refund of RM3,880,597.01 as provided under cl 9.02 of the SSA. The claim for damages in the form of interest for the loss of use of the funds was premised on the doctrine of unjust enrichment.

[12] For the respondents learned counsel Mr Alan Wong submitted that at the material time the representations/warranties made by the first respondent were true. However the respondents were unable to maintain the 30% equity in the concessions due to the appellant's breach of its reciprocal obligation to contribute to the working capital of the second respondent including the call for an increase in the capital of the concession companies. Learned counsel submits that the appellant's reciprocal obligation was triggered with the completion of the sale of the 25% shares of the second respondent company and not upon the completion of the sale of the remaining shares.

[13] We agree with the learned judicial commissioner that Recital E of the SSSA provides that fulfillment of the CPs had been waived in respect of the sale

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Wed Aug 27 17:07:23 2014

of the 25% shares only. The provisions of cl 4.1 of the SSSA clearly stipulates that the balance 42% shares shall only be transferred to the appellant subject to the fulfillment of the CPs as stated in article III of the SSA. We find no inconsistency between the SSA and the SSSA.

[14] We are unable to agree with learned counsel for the respondents that the appellant's reciprocal obligation was triggered with the completion of the sale of the 25% shares. We find that cl 10.01 clearly states that the parties' reciprocal obligations only arises 'from the target date' which is defined in cl 3.03 as the date when the SSA becomes unconditional. This event would only occur 'Upon the fulfillment or waiver of all the conditions precedent'. Since fulfillment of the CPs had not been waived in respect of the sale of the remaining 42% of the second respondent's shares and as it was not disputed that the first respondent had not fulfilled the CPs therefore the purchase of the balance 42% could not be completed and the target date has not crystallised. The effect is that the appellant had yet to own 67% of the first respondent's shares in the second respondent company as contemplated under the SSA. In the circumstances we are of the view that the learned judicial commissioner has erred in finding that the appellant was in breach of cl 10.01. We agree with learned counsel for the appellant that the appellant's reciprocal obligation under cl 10.01 has not been triggered.

[15] On the evidence we find that there was a clear breach of the SSA by the first respondent. Therefore the appellant was entitled to exercise its contractual right to terminate both the SSA and the SSSA and to request for the refund of the RM3,880,597.01 paid to the first respondent.

[16] For the reasons stated we allowed the appeal and the reliefs prayed for in prayers 1, 2 and 7 of the statement of claim. In respect of interests as prayed for in prayer (3), we allowed interests at the rate of 8%pa from the date of termination ie 25 January 2008 until 1 August 2012 and thereafter at 4%pa till date of full payment.

Appeal allowed.

Reported by Ashok Kumar